

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

The City of Pekin, a Municipal
Corporation

Petition for Approval Pursuant to
735 ILCS 5/7-102 to Condemn a
Certain Portion of the Waterworks
System of Illinois-American Water
Company

Docket No. 02-0352

**REPLY BRIEF OF PETITIONER CITY OF PEKIN
IN OPPOSITION TO EXCEPTIONS**

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I. INTRODUCTION

Petitioner City of Pekin opposes the Exceptions filed by IAWC in this matter and opposes Staff's Exception to the ruling in the Proposed Order regarding extraterritorial customers. IAWC's objections center on the portions of the Proposed Order that uphold Pekin's authority to condemn property beyond its municipal borders and that find concerns about extra-territorial customers to be largely irrelevant. Both of IAWC's arguments should be rejected, as should Staff's argument regarding speculative discrimination against extraterritorial customers.

Pekin filed its Petition under Division 130, which specifically provides for acquisition of a waterworks in its entirety by eminent domain. The Commission cannot disregard the plain and unambiguous language of the statute. Doing so, as IAWC suggests, would allow a municipality to exercise its statutory rights under Division 130 only in those rare cases where the water service area exactly coincided with the municipality's political borders, effectively negating that statute.

In addition, the Proposed Order properly concluded that speculative concerns about future discrimination against customers who live outside the City's limits are largely irrelevant here. The Staff found no basis to conclude that such discrimination has or will occur. More importantly, this concern would exist in every condemnation case in which some customers live outside municipal borders, and would once again effectively preclude municipalities from exercising their eminent domain powers in each of those cases.

Pekin therefore respectfully requests that both of IAWC's Exceptions and the Staff's Exception on extraterritorial customers be overruled, as set forth below.

II. ARGUMENT

A. The ALJPO correctly concludes that Division 130 authorized Pekin to condemn waterworks that extended beyond its city limits.

IAWC presses its untimely argument that Division 130 of the Illinois Municipal Code does not confer authority on the City to condemn that portion of the Pekin System lying outside its municipal boundaries. That view is contrary to the finding of the Administrative Law Judge in his Proposed Order. It is also contrary to the plain language of Division 130.

As recognized by the cases cited by IAWC, “[a] primary rule of statutory construction is that a court must give the language of the statute its plain and ordinary meaning.” Village of Bolingbrook v. Citizens Utility Co., 267 Ill. App.3d 358, 359 (Ill. App. 1994) (citation omitted). The Supreme Court of Illinois has explained that:

The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. When the plain language of the statute is clear and unambiguous, the legislative intent that is discernable from this language must prevail, and no resort to other tools of statutory construction is necessary.

Land v. Board of Education of the City of Chicago, 202 Ill.2d 414, 421-422, 781 N.E.2d 249, 254 (Ill. 2002) (citations omitted); see also, e.g., Baker v. Cowlin, 154 Ill.2d 193, 197, 607 N.E.2d 1251, 1253 (Ill. 1993) (“[w]here the statutory language is clear, it will be given effect without resort to other aids for construction”).

Division 130 is clear on its face. It permits a municipality to purchase “a waterworks system in its entirety.” 65 ILCS 5/11-130-1 provides that “any municipality may purchase or construct waterworks or construct improvements to its waterworks as provided in this Division 130.” Section 11-130-2 of Division 130 then defines the term

“waterworks”: “the term ‘waterworks’, as used in this Division 130, means and includes a waterworks system in its entirety or any integral part thereof, including mains, hydrants, meters, valves, stand pipes, storage tanks, pumping tanks, intakes, wells, impounding reservoirs, or purification plants.” 65 ILCS 5/11-130-2. As concluded by the ALJ, and consistent with the plain language of Division 130, “Division 130 is not confined to the purchase of waterworks located within a given municipal boundaries, but to any waterworks or integral part thereof, wherever the plant happens to be.” (ALJPO, p. 38).

The Legislature also granted municipalities the right of eminent domain to exercise Division 130's broad acquisition powers. “For the purpose of purchasing any waterworks under this Division 130, or for the purpose of purchasing any property necessary therefore, the municipality has the right of eminent domain as provided in Article VII of the Code of Civil Procedure as heretofore and hereafter amended.” 65 ILCS 5/11-130-9. The City therefor has the power to use eminent domain to acquire an entire waterworks system (and any property necessary therefor), even if a part of that system may be outside of its corporate boundaries. Any other conclusion, would ignore the plain and ordinary meaning of Division 130. Moreover, IAWC’s interpretation would read the right of eminent domain completely out of Division 130, despite the legislature’s specific grant in 65 ILCS 5/11-130-9, except in the rare instance where a municipality shares the identical footprint of a waterworks company.

IAWC continues to argue that Division 117 of the Municipal Code somehow changes the plain and ordinary meaning of Division 130. IAWC continues to miss the

point: Division 117 is inapposite. The City has proceeded under Division 130 from the outset. IAWC's tortuous reasoning cannot change that.

The legislative grant of extraterritorial condemnation powers in Division 130 simply presents a choice. Division 117 applies to many different types of utilities, including power, water, transportation, and telecommunications. 65 ILCS 5/11-117-2. Division 130, on the other hand, applies solely to waterworks systems. 65 ILCS 5/11-130-1. Moreover, Division 117 confers different types of acquisition powers upon municipalities under different types of circumstances. 65 ILCS 5/11-117-1. Division 130 is straightforward, and permits a municipality to purchase, by eminent domain, "a waterworks system in its entirety or any integral part thereof." Each statute has different provisions concerning the issuance of bonds to pay for acquisition (*compare* 65 ILCS 5/11-117-8 with 65 ILCS 5/11-130-3, 4, 5, 6 and 7). Division 117 provides for the use of special assessments against specific property benefited by the acquisition. 65 ILCS 5/11-117-10. Division 130 has no such provision.

A municipality's choice to proceed under Division 130 or Division 117 (or under any of the other statutes permitting acquisition of a water system) could be based on any one or more of the differences between the statutes. The City chose to bring this Petition pursuant to Division 130, not Division 117. The provisions of Division 117 do not apply in this matter and should not be construed to override the straightforward meaning of Division 130.

The case citations in IAWC's Brief on Exceptions are surprising. Consistent with the court's determination in Village of Bolingbrook, Pekin has come to the Commission to request approval prior to commencing its eminent domain action. The limited

determination in Village of Bolingbrook that a municipality must first receive Commission approval does not support the sweeping proposition suggested by IAWC that Division 130 must always be construed strictly against a municipality. As for Dillie, the language of Division 130 is clear on its face. Thus, no resort to other tools of statutory construction is necessary.

The ALJPO correctly found that the City has the necessary authority to condemn the Pekin District in its entirety under the provisions of Division 130.

B. The ALJPO correctly concludes that Staff concerns about potential disparate treatment of extraterritorial customers is largely irrelevant.

IAWC fundamentally misconstrues Staff's position regarding extraterritorial customer concerns. In its Exceptions, it seeks to confuse its own warrantless and unsubstantiated arguments with those of the Staff, hoping to import and impose its position upon Staff and the record. Staff supports its Exception on this issue based solely on its continuing position that Pekin cannot guarantee extraterritorial customers continued protection through Commission regulation and oversight.

IAWC argues, at Page 8 of their Exceptions, that Staff witness Johnson found that "the City failed to adequately address the concerns regarding possible discrimination against non-residents," and it then recites again its paltry and meritless evidence about annexation, Brush Hill, and an ancient record of alleged past discrimination against non-residents. Those flimsy positions are addressed fully in the City's Exceptions, at Pages 22 through 26, and the common law protections against unfair discrimination are set forth there as well.

The ALJ in his Proposed Order correctly states Staff witness Johnson's position on the issue: "To suggest, as does Staff, that this concern alone should lead to the denial of the request for eminent domain would render the authority granted by the statute nugatory." (ALJPO , at Page 38). That was Staff witness Johnson's position – that this concern alone must necessarily lead to denial. IAWC ignores the fact that Staff clearly found City ownership offered many advantages and served the public, apart from its purely academic concern about the lack of a Commission non-discrimination guarantee for extraterritorial customers -- a situation implicit in any condemnation in which any customer lives outside the municipality. Staff witness Johnson's direct testimony states the clear advantages of municipal ownership by Pekin.

1. The City's income tax exemption;
2. The City's ability to pursue funding sources unavailable to private enterprises;
3. The absence of a rate of return on capital improvements;
4. The ability and control to directly negotiate Pekin District concerns with developers and large industrial customers;
5. Integrated and flexible infrastructure planning;
6. Direct resolution of Pekin District maintenance concerns;
7. City fire department prioritization of main replacements;
8. Citizen support demonstrated by recent referendum;
9. City commitments to non-discriminatory treatment of customers outside Pekin boundaries;
10. A proposed five-year rate freeze; and

11. The ability of most customers to maintain oversight of Pekin District operations though the accountability of elected officials. (Staff Exhibit 1.0, pages 16 - 17).

In his rebuttal, however, Johnson reversed his initial final conclusion favoring Pekin's ownership, solely on the basis of a municipality's inability to guarantee continued protection through Commission regulation and oversight. Staff witness Johnson continued to endorse the other stated advantages of City ownership for both residents and non-residents alike. (TR 72 - 73; 76). Importantly, and most critically, Staff found no basis in Pekin's prior record and history to conclude that such discrimination had or would occur. (TR 75; 82 – 83; 95). The City demonstrated that since 1975 it has more than fairly treated its extraterritorial customers served through its wastewater system. (TR 386-388).

Thus, the ALJPO correctly finds that Staff's position is based solely upon the mere presence of extraterritorial customers and the inherent lack of Commission oversight for these customers. The ALJPO properly observes that: "[i]t is apparent that in any instance where a municipality seeks to condemn utility property that serves customers outside the municipality, the same concerns would be raised." (ALJPO, Page 38).

In this factual context, and this is the factual context of the case, every municipal attempt to exercise statutorily authorized condemnation rights would be thwarted except in extremely unlikely circumstances where the City and the service area are geographically identical. Staff's concern would essentially and improperly negate the statutory authority, as the ALJPO concludes, for "this will always be the case, and will

inevitably lead to requests such as the one before the Commission being denied, thereby eviscerating the very authority granted." (ALJPO, Page 38).

The ALJPO finding that this concern alone is irrelevant is correct.

In its Exceptions, IAWC attempts to transform Staff witness Johnson's academic concern for extraterritorial customers in all municipal condemnations into factual findings regarding discrimination by Pekin. There is no such evidence in this matter, and, as noted above, Staff reached the opposite conclusions factually. Staff found no record of discrimination, because there was none. (Tr., pp. 82-83) Staff found no basis to conclude that Pekin would not live up to its formally adopted commitment to non-discrimination for existing customers lying outside the City. Id. Other than the academic potential for discrimination inherent in all municipal condemnations, there was no evidentiary basis to conclude Pekin's actions, past or looking to the future, caused any concerns.

The ALJPO correctly finds that Staff's concern is largely irrelevant.

III. CONCLUSION

For the reasons set forth above, both Exceptions filed by Illinois-American Water Company and Staff's Exception to the ruling in the Proposed Order regarding extraterritorial customers should not be adopted.

The ALJPO correctly concludes that Petitioner City of Pekin has authority under Division 130 to condemn portions of waterworks that are located outside its city limits, and that Staff concerns about extraterritorial customers is largely irrelevant. Pekin respectfully submits that the replacement language offered in IAWC's Exceptions and Staff's Exception regarding extraterritorial customers should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Edward D. McNamara, Jr., an attorney, hereby certifies that he served copies of the foregoing Reply Brief of Petitioner City of Pekin in Opposition to Exceptions on the individuals shown on the attached Service List, via electronic mail, on November 24, 2003.

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